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## PRE-INSTALLED SOFTWARE – AN UNFAIR COMMERCIAL PRACTICE?

Case C-310/15 *Deroo-Blanquart v Sony*, EU:C:2016:633

Neža Zupančič & Katri Havu\*

### 1. Introduction

The Court of Justice (the Court) discussed pre-installed software from the point of view of unfair commercial practices and consumer protection in a recent preliminary ruling in Case C-310/15 *Deroo-Blanquart v Sony*.<sup>1</sup> The case essentially addresses the interpretation of the Unfair Commercial Practices Directive 2005/29/EC (the UCPD)<sup>2</sup>, in particular the notions of unfair commercial practice<sup>3</sup> and misleading omission.<sup>4</sup>

The UCPD aims to contribute to the functioning of the Internal Market and achieve a high level of consumer protection by harmonizing the law on unfair commercial practices that harm consumers' economic interests.<sup>5</sup> The Directive entails a relatively complex system of regulation, including a general prohibition of unfair practices (Article 5) and more specific provisions on practices which, in particular, are unfair. Moreover, the Directive contains a 'black list' of practices which are always considered unfair.<sup>6</sup>

The judgment in *Deroo-Blanquart v Sony* clarifies, in particular, that EU rules prohibiting unfair commercial practices in business-to-consumer (B2C) relationships may not easily be seen as prohibiting a sales practice where a certain type of computer may only be acquired equipped with pre-installed software. Moreover, when selling to a consumer a computer with pieces of pre-installed software, it is sufficient to indicate the overall price of the product but it is not necessary to communicate the price of each item of software separately.

As observed from a broader EU law perspective, this is not the first time that software and tying products intended for consumers have raised concerns. Under competition law, for instance, similar issues surfaced in the prominent *Microsoft* case in the context of abuse of a dominant market position.<sup>7</sup> Against this background, cases such as *Deroo-Blanquart v Sony* – now discussed by the Court solely from the perspective of the UCPD but hypothetically entailing an interesting factual setting from the standpoint of other bodies of norms as well – may also be seen as inviting critical discussion on the fragmented nature of law and enforcement systems

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<sup>1</sup> Case C-310/15 *Deroo-Blanquart v Sony Europe Limited*, EU:C:2016:633.

<sup>2</sup> Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council [2005] OJ L 149/22.

<sup>3</sup> *Ibid.*, Article 5.

<sup>4</sup> *Ibid.*, Article 7.

<sup>5</sup> *Ibid.*, in particular Article 1 and Recitals 3–8, 11–20.

<sup>6</sup> *Ibid.*, see in particular Articles 5–9 and Annex I; see further, for example, N. Reich et al., *European Consumer Law* (2<sup>nd</sup> edition, Intersentia, 2014), in particular p. 95–96.

<sup>7</sup> See, in particular, Case T-201/04 *Microsoft*, EU:T:2007:289, para. 841–1167; see also Commission Decision of 16.12.2009, Case COMP/C-3/39.530 – *Microsoft* (tying).

targeting unfair commercial practices or unfair trading, competition and related consumer protection in the EU.

## 2. Factual and legal background

In December 2008, Mr Deroo-Blanquart bought a Sony personal laptop computer model VAIO VGN-NR38E. As is customary, the computer came with pre-installed software, including in particular the Windows Vista Home Premium operating system. Subscribing to the pre-installed operating system requires the user to agree to an 'end-user licence agreement' (EULA) the first time the computer is run. The user can also opt out of using the pre-installed operating system by not agreeing to EULA, as Mr Deroo-Blanquart decided to do.<sup>8</sup>

However – and probably unlike other users that opt out of using pre-installed software – Mr Deroo-Blanquart requested reimbursement of the part of the purchase price which corresponded to the software. Sony refused, stating that the computer and software form a unified and non-separable offer.<sup>9</sup> After further discussions, Sony offered to cancel the sale and reimburse the full cost of € 549, provided that Mr Deroo-Blanquart returned the computer. Mr Deroo-Blanquart did not accept and eventually, in February 2011, initiated proceedings in the District Court of Asnières. He claimed reimbursement of € 450 for the pre-installed software as well as € 2500 compensation for damage suffered due to unfair commercial practices. The claims were dismissed, and Mr Deroo-Blanquart lodged an appeal with the Versailles Court of Appeal. The earlier judgment was upheld by the Court of Appeal, which stated that the practice in question 'did not constitute the unfair commercial practice of coercive selling, which is not permitted under any circumstances, an unfair commercial tying practice, or a misleading or aggressive commercial practice.'<sup>10</sup>

Mr Deroo-Blanquart pursued a further appeal before the Court of Cassation, which, after noting that the relevant national provisions fell within the scope of the UCPD, stayed the proceedings and submitted to the Court a preliminary ruling request entailing the following interpretative questions:

- 1) Must Articles 5 and 7 of [the UCPD] be interpreted as meaning that a combined offer consisting of the sale of a computer equipped with pre-installed software constitutes a misleading unfair commercial practice where the manufacturer of the computer has, via its retailer, provided information on each item of pre-installed software, but has not specified the cost of each individual component?
- (2) Must Article 5 of [the UCPD] be interpreted as meaning that a combined offer consisting of the sale of a computer equipped with pre-installed software constitutes an unfair commercial practice where the manufacturer leaves the consumer no choice other than to accept the software or cancel the sale?
- (3) Must Article 5 of [the UCPD] be interpreted as meaning that a combined offer consisting of the sale of a computer equipped with pre-installed software

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<sup>8</sup> Case C-310/15 *Deroo-Blanquart v Sony*, para. 18–19.

<sup>9</sup> *Ibid.*, para. 19–20.

<sup>10</sup> *Ibid.*, para. 20–24.

constitutes an unfair commercial practice where the consumer is unable to obtain a computer which is not equipped with software from the computer manufacturer?<sup>11</sup>

Because the provisions in question, Articles 5 and 7 of the UCPD, lay down a general prohibition of unfair commercial practices and prohibition of misleading omissions respectively, and are deliberately written in an open ended-manner, every clarification from the Court is valuable.<sup>12</sup>

### 3. Reasoning of the Court

The Court, which proceeded to judgment without an Opinion by the Advocate General, started by examining the second and third questions together. In essence, the issue here was whether the sale of a computer with tied-in software, with no possibility of buying the same computer without the software, constitutes an unfair commercial practice under Article 5(2) of the UCPD.<sup>13</sup>

The Court first addressed the technicalities of the issue. It noted that the practice of so-called combined offers indeed falls within the purview of commercial practices as defined in the UCPD, Article 2(d), as is also established in case law.<sup>14</sup> Moreover, only the practices explicitly listed in Annex I to the UCPD are automatically considered unfair. Combined offers are not included in that closed list; thus they are not and may not be categorically prohibited, so that closer examination of the situation is required.<sup>15</sup>

The Court pointed out that in order to find a practice unfair, Article 5(2) of the UCPD requires that two cumulative conditions are fulfilled. First, the practice has to be contrary to standards of professional diligence. Second, the practice has to materially distort or be likely to materially distort the economic behaviour of the average consumer with regard to the product. At this point the Court was also careful to stress the notion of *average consumer*, which is, as explained in the UCPD, Recital 18, central for application of the Directive.<sup>16</sup> The average consumer is defined as an individual 'who is reasonably well-informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors.'<sup>17</sup>

Moving on to analysis of the first condition under Article 5(2), the Court remarked that professional diligence is defined in Article 2(h) of the UCPD as the special standard of skill and care that the trader can be reasonably expected to demonstrate towards the consumer, proportionate with honest market practice and/or the applicable principle of good faith in the particular field.<sup>18</sup> Studying the circumstances of the present case, the Court noted, on the basis of a market analysis provided to it, that the sale of computers with pre-installed software meets the expectations of most consumers and a significant portion of consumers prefer the arrangement. Additionally, Mr Deroo-Banquart was appropriately informed about the items of

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<sup>11</sup> Ibid., para. 26.

<sup>12</sup> See also Recitals 13–20 of the UCPD.

<sup>13</sup> Case C-310/15 *Deroo-Blanquart v Sony*, para. 27.

<sup>14</sup> Ibid., para. 28; see also Joined Cases C-261/07 and 299/07 *VTB-VAB v Total Belgium*, EU:C:2009:244, para. 50–52.

<sup>15</sup> Case C-310/15 *Deroo-Blanquart v Sony*, para. 29–31; see also Joined Cases C-261/07 and 299/07 *VTB-VAB v Total Belgium*, para. 51–62.

<sup>16</sup> Case C-310/15 *Deroo-Blanquart v Sony*, para. 32.

<sup>17</sup> The UCPD, Recital 18.

<sup>18</sup> Case C-310/15 *Deroo-Blanquart v Sony*, para. 33; the UCPD, Article 2(h).

software pre-installed on the relevant computer. Furthermore, he had been offered the options of subscribing to EULA and using the pre-installed software or cancelling the sale.<sup>19</sup> The Court concluded that the circumstances in this case 'are likely to satisfy the requirements of honest market practices or of the principle of good faith' and the trader thus demonstrated necessary care towards the consumer.<sup>20</sup>

In its evaluation of the second condition of Article 5(2), the Court again turned to concept definitions in the UCPD, particularly Article 2(e) of the Directive, which defines the concept of 'materially distort[ing] the economic behaviour of consumers' as 'using a commercial practice to appreciably impair the consumer's ability to make an informed decision, thereby causing the consumer to take a transactional decision that he would not have taken otherwise.'<sup>21</sup>

The Court underlined the relevance of the issue whether the consumer was sufficiently aware of the fact that the computer was only available with pre-installed software and whether, thus, the consumer could have made an informed decision by choosing a computer of, for instance, a different brand which would be more suitable for his purposes. The level of care by the trader (Sony) and the consumer's (Mr Deroo-Blanquart's) level of information about the nature of the product were already illustrated in the examination of the previous condition. Additionally, the Court pointed out the particular importance of clarifying the conditions and consequences of the sales contract, since this is ultimately the information most relevant to decision-making by the consumer.<sup>22</sup> The Court stated that it is up to the referring court to decide whether the ability of the consumer to make an informed transactional decision was notably impaired in circumstances, such as those in the present case, where the consumer was, in particular, explicitly informed that the computer model in question was sold only with pre-installed software.<sup>23</sup>

The Court concluded that the answer to the second and third questions should be that the practice of selling computers with tied-in software, with no option to purchase the same model without the software, is not an unfair commercial practice contrary to Article 5(2) of the UCPD, unless it appears that the practice is contrary to the requirements of professional diligence and materially distorts or is likely to distort the economic behaviour of the average consumer with regard to the product. Whether such problems are present in the circumstances of the case in the main proceedings was noted to be for the referring court to resolve (in the light of the relatively straightforward guidance provided by the Court).<sup>24</sup>

The Court then examined the first question, which, in essence, asked whether it constitutes a misleading commercial practice to not specify the price of each component of the offer, i.e., the computer and the pieces of software. Specifically, the issue was whether this would be unfair as a misleading omission, according to Article 5(4)(a) and Article 7 of the UCPD.<sup>25</sup> The Court

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<sup>19</sup> Case C-310/15 *Deroo-Blanquart v Sony*, para. 34–36. It had been held earlier that, especially if correct information is provided to consumers, a combined offer can satisfy the requirements of fairness under the UCPD: Joined Cases C-261/07 and 299/07 *VTB-VAB v Total Belgium*, para. 66.

<sup>20</sup> Case C-310/15 *Deroo-Blanquart v Sony*, para. 37.

<sup>21</sup> *Ibid.*, see para. 38; the UCPD, Article 2(e).

<sup>22</sup> Case C-310/15 *Deroo-Blanquart v Sony*, see para. 38–41; see similarly Case C-26/13 *Kásler and Káslerné Rábai*, EU:C:2014:282, para. 70.

<sup>23</sup> Case C-310/15 *Deroo-Blanquart v Sony*, see para. 41–42.

<sup>24</sup> *Ibid.*, para. 42.

<sup>25</sup> *Ibid.*, see para. 43–44, 26.

repeated the definition of misleading omission from Article 7(1) as an omission that in given circumstances 'omits material information that the average consumer needs in order to make an informed transactional decision and thereby causes or is likely to cause the average consumer to make a transactional decision that he would not have taken otherwise.'<sup>26</sup> Additionally, the Court highlighted Article 7(4)(c), which addresses one of the pieces of material information that has to be included – the price. Under these provisions, the material information consists of the full price including taxes, or if the price is not available in advance the method of calculating it, including possible delivery costs, or at the very least notification that these costs might be included. The Court pointed out that Article 7 concerns only the price of the overall product as material information, and does not require display of the prices of its individual components.<sup>27</sup>

Because of the nature of the question asked and the facts of the case, the Court clarified the issue further. It turned to Recital 14 of the UCPD and noted that it follows from its phrasing that key items of information which are needed by a consumer in order to make an informed transactional decision constitute material information.<sup>28</sup> Furthermore, under Article 7(1), whether a piece of information is material should be evaluated *in casu*, against the relevant factual background.<sup>29</sup> In this case, a computer was offered for sale only with the pre-installed software, and the Court established by answering the two other questions that there is nothing inherently unfair in that commercial practice.<sup>30</sup> Hence, the Court concluded that failure to indicate the price of each separate component in a combined offer like the one at issue does not prevent the average consumer from making an informed decision. Thus, the price of each piece of pre-installed software does not constitute material information, and it is not a misleading commercial practice to not indicate the price of those items of software.<sup>31</sup>

## 4. Discussion

### 4.1. Clarifications in the Ruling and Room for Discretion Left for the National Court

The ruling in *Deroo-Blanquart v Sony* provides clarifications in terms of the treatment of a computer with pre-installed software as a combined offer and commercial practice. Importantly, it states that selling computers equipped with pre-installed software, without the option of buying the device minus the software, does not in itself constitute an unfair commercial practice under Article 5(2) of the UCPD, unless a national court finds that in the circumstances of a concrete case the practice is contrary to the requirements of professional diligence and distorts or is likely to distort the economic behaviour of the average consumer with regard to the product.<sup>32</sup> To guide the related evaluation by the referring national court, the Court especially emphasised the relevance of accurate information about tied-in software and

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<sup>26</sup> Ibid., para. 45; the UCPD, Article 7(1).

<sup>27</sup> Case C-310/15 *Deroo-Blanquart v Sony*, see para. 45–46.

<sup>28</sup> Ibid., para. 48; the UCPD, Recital 14.

<sup>29</sup> Case C-310/15 *Deroo-Blanquart v Sony*, para. 49.

<sup>30</sup> Ibid., see para. 50.

<sup>31</sup> Ibid., para. 51–52.

<sup>32</sup> Ibid., para. 32–37, 42, 53.

its implications being communicated to the consumer and of the possibility to cancel the sale afterwards.<sup>33</sup>

Furthermore, the fact that including pre-installed software seemed to meet the expectations of a notable proportion of consumers was important for the *in casu* evaluation of the appropriateness of the business practice. The Court underlined that circumstances such as those of *Deroo-Blanquart v Sony* are likely to satisfy the requirements of professional diligence and appropriate business behaviour – the national court was thus given relatively clear guidance as to what its conclusion should be.<sup>34</sup>

Additionally, the role of information provided to the consumer was highlighted in *Deroo-Blanquart v Sony* in a manner which actually relatively strongly guides the referring court, even though the final evaluation as to whether the practice of selling computers with pre-installed software but without the option of merely buying the computer might affect the consumer's decisions or ability to make informed decisions about the relevant product was left for the national court's consideration.<sup>35</sup>

Moreover, the judgment in *Deroo-Blanquart v Sony* highlights that in terms of material information to be communicated to consumers in the case of a computer with pre-installed software, it is the overall price of the package that is relevant. The prices of individual pieces of software need not be indicated.<sup>36</sup> The Court presented this finding as a result of interpreting the provisions on misleading omissions and material information (Articles 5(4)(a) and 7 of the UCPD).<sup>37</sup> The fact that the computer model relevant in the case was only offered for sale with the pre-installed software contributed to the conclusion.<sup>38</sup> The ruling illustrates that even though further details could be considered interesting, the law focuses on what information is absolutely necessary.

Considering the substantive findings and interpretations presented in the ruling, the conclusions of the Court are not surprising. As illustrated above, the Court relied on its previous judgments, which examined the interpretation of the UCPD, in particular Joined Cases C-261/07 and 299/07 *VTB-VAB v Total Belgium*.

Another aspect of the case is the critique that arose from other fields of law, in particular that the Court missed an opportunity to address some burning issues of IT law. Despite relatively few critical voices of this ruling, the common underlying objection seems to be that the Court did not understand the significance of its decision and missed an opportunity to catch up with the demands of rapidly developing technology and especially the free software movements.<sup>39</sup> While these critiques hold some merit, it is at the same time necessary to recognise that the Court is, firstly, confined to the limits of the question asked – in the present case, the realm of

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<sup>33</sup> Ibid., para. 35–37, 40–42, 53.

<sup>34</sup> Ibid., in particular para. 35–37.

<sup>35</sup> Ibid., in particular para. 41.

<sup>36</sup> Ibid., para. 45–53.

<sup>37</sup> Ibid., para. 43–52.

<sup>38</sup> Ibid., in particular para. 50–51.

<sup>39</sup> See for instance I. Emanuilov 'Free as in freedom? A tale of...forced bundling', *KU Leuven Centre for IT and IP Law* (2016), <https://www.law.kuleuven.be/citip/blog/free-as-in-freedom-a-tale-of-forced-bundling/>; J. Baker 'Non, Monsieur! – Sony wins battle over preinstalled Windows in Europe's top court' *Arstechnica* (2016), <http://arstechnica.com/tech-policy/2016/09/sony-wins-pre-installed-software-windows-battle-cjeu/>.

the UCPD. Secondly, in its interpretation, the Court has to walk a fine line between the relevant legal starting points and the real life consequences of rulings. Additionally, one must also consider the tension within the goals of the UCPD itself, specifically the goal of balancing consumer protection on one side, and smooth operation of the internal market on the other.<sup>40</sup> This combination of goals signifies, among other things, that protection of consumers, let alone increased consumer choice, may not be promoted without limitations.

Some further remarks should also be presented from the standpoint of the interrelationships of full harmonization by the UCPD, interpretations by the Court of Justice, and the role of national courts. The nature of the approach of the UCPD and its provisions as open-ended legislation, which underlines the significance of the reasoning by national courts applying the law to the particular circumstances of each case, may be critically contrasted with the idea of the intended full harmonization.<sup>41</sup>

The systematic choices of the Directive are prone to leave notable room for discretion by national courts. In turn, this may also mean that the Directive and the law implementing it may be applied in a divergent manner. As is well known, it is for the domestic courts to apply the law to the facts, whereas the Court of Justice provides information on the correct interpretation of EU law.<sup>42</sup> Nonetheless, judgments such as *Deroo-Blanquart v Sony* illustrate that when answering preliminary ruling questions, the Court of Justice is willing, at least at points, to take a significantly active role, guiding national courts to such an extent that the 'correct' conclusions are nearly ready on the basis of the reasoning of the Court of Justice. This contributes to achieving full harmonization.<sup>43</sup> However, among other matters the proportion of cases where preliminary ruling requests are not made may continue to potentially create issues related to divergent interpretations and applications.

#### 4.2. Pre-installed Software and Appropriate Business Practices from a Broader Perspective

The UCPD, which constitutes B2C legislation, with a 'side-effect' of granting certain protection to companies<sup>44</sup>, is part of a broader European picture of law on appropriate and inappropriate business behaviour and trading practices. The whole, which includes EU and national legislation on unfair commercial practices and on unfair contract terms, as well as EU law on free movement and EU and national competition law, is not as coherent and clear as one could hope for.<sup>45</sup> Even though the judgment in *Deroo-Blanquart v Sony* is not highly surprising or

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<sup>40</sup> See also, for instance, J. Stuyck, 'The Court of Justice and the Unfair Commercial Practices Directive', 52 *CMLR* (2015), p. 721, 750–751 in particular.

<sup>41</sup> See the UCPD, in particular Recitals 3–8, 11–20; see also J. Stuyck 52 *CMLR* (2015) p. 721, 721–722, 749–752.

<sup>42</sup> See further, for example, A. Arnall, *The European Union and its Court of Justice* (2nd edition, OUP, 2006), p. 96, 104–114; consider also P. Rott, 'Unfair Contract Terms', in C. Twigg-Flesner (ed.), *Research Handbook on EU Consumer and Contract Law* (EE, 2016), p. 287, 296–297.

<sup>43</sup> In the context of the minimum harmonisation Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L 95/29, the Court has originally underlined that it should abstain from applying law to concrete cases, thus leaving this for national courts (see for example Case C-237/02 *Freiburger Kommunalbauten GmbH Baugesellschaft*, EU:C:2004:209, para. 21–25). More recently, the Court has, however, also given very specific guidance, leaving little room for discretion (see for example Case C-92/11 *RWE Vertrieb AG*, EU:C:2013:180, para. 40–55). See also further P. Rott, in C. Twigg-Flesner (ed.), *Research Handbook on EU Consumer and Contract Law*, p. 296–299.

<sup>44</sup> See the UCPD, in particular Recital 8, which notes that the Directive 'also indirectly protects legitimate businesses from their competitors' and thus 'guarantees fair competition in fields coordinated by it'.

<sup>45</sup> See for further critical discussion, for example, J. Stuyck 52 *CMLR* (2015), p. 721–726, 743–752.



remarkable as observed merely from the standpoint of the UCPD, factual situations such as that visible in the case are prone to raise questions about interfaces and interrelationships between unfair trading, consumer protection and competition law regimes and enforcement systems.

The relevant bodies of rules and systems of enforcement are significantly separate from each other and planned to 'keep within their own boxes' – thus, resolving the correct application of one Directive does not mean that all is well with regard to a factual situation. The practice of selling computers only with certain pre-installed software could hypothetically be problematic from the perspective of competition law prohibition of abuse of dominance, Article 102 of the Treaty on the Functioning of the EU (TFEU).<sup>46</sup> An evaluation from the standpoint of the UCPD does not explore this issue, or other matters beyond the scope of the Directive.

Nevertheless, it should be noted that even when observed in a broader EU law context, tying is not perceived as absolutely and universally harmful. For instance, the seminal *Microsoft* case highlights the complexity of tying as a concept, as well as detailed analysis of the factors that can affect evaluation in terms of illegality.<sup>47</sup>

The several potentially relevant bodies of norms signify that a practice such as selling pre-installed software would have to be questioned from the perspective of several sources of rules, likely, at least to some extent, in separate proceedings, in order to gain a full picture of whether the factual situation entails illegal aspects.<sup>48</sup> In some of the proceedings needed, the position of a consumer-complainant may be weak. This could be said, in particular, about the field of competition law.<sup>49</sup> Moreover, in the EU, the availability and practical usefulness of collective

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<sup>46</sup> Under Article 102 TFEU, it would have to be evaluated whether the undertaking in question is in a dominant market position and, if so, whether tying computers and software together constitutes (unjustifiable) abuse. These issues cannot be resolved on the basis of information available in *Deroo-Blanquart v Sony*, but the hypothetical relevance in situations akin to that of the case should be noted; see also on tying pieces of software together Case T-201/04 *Microsoft*, in particular para. 841–1167; Commission Decision of 16.12.2009, Case COMP/C-3/39.530 – *Microsoft* (tying). For a broader understanding of the Commission's views on tying, see also Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C 45/7, in particular para. 47–62. On the interface of competition and consumer issues see for instance C. Osti, 'Interpreting Convergence: Where Antitrust meets Consumer Law', 5 *European Competition Journal* (2009), p. 377.

<sup>47</sup> Case T-201/04 *Microsoft*, in particular para. 842, 850–870.

<sup>48</sup> As to enforcement and interfaces with national law in the case of the UCPD, see J. Stuyck 52 *CMLR* (2015), p. 743–748; W. van Boom, 'Unfair Commercial Practices', in C. Twigg-Flesner (ed.), *Research Handbook on EU Consumer and Contract Law* (EE, 2016), p. 388, 395–404. As to the judgment in *Deroo-Blanquart v Sony*, this was not received enthusiastically everywhere (see footnote 39), which underlines the prospect that similar factual situations could raise concerns which now are outside the scope of the case.

<sup>49</sup> A complaint or a request for investigation may be submitted to the European Commission or national competition authorities, but they are not under obligation to start an investigation (see Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L 1/1, Articles 4–7); consumers may also bring private enforcement, that is, contractual or damages claims in national courts, but succeeding in such claims remains challenging; for further discussion, see, for example, K.J. Cseres and J. Mendes, 'Consumers' access to EU competition law procedures: Outer and inner limits', 51 *CMLR* (2014), p. 483; K. Havu, 'The Digital Single Market and E-commerce: Some Remarks concerning Online Sales and Distribution from the Private Enforcement Point of View', 9 *GCLR* (2016), p. 50, 51, 54–55.

redress mechanisms, which can be especially useful in situations involving multiple weak parties such as consumers, remain dependent on Member State laws.<sup>50</sup>

It is evident that no simple legal solution and related comprehensive enforcement framework, covering unfair commercial practices and similar issues, competition matters and consumer protection – and combining the EU and national system levels in a smart manner – is easily available. Nevertheless, any possibility to increase coherence and cooperation between different legal ‘approaches’ should be discussed and embraced.

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<sup>50</sup> See Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (2013/396/EU) [2013] OJ L 201/60; for discussion see, for instance, M. Ioannidou, *Consumer Involvement in Private EU Competition Law Enforcement* (OUP, 2015).